STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK JOHN WEBER III,

Defendant-Appellant.

UNPUBLISHED
February 22, 2007

No. 266894
Macomb Circuit Court
LC No. 2005-000166-FH

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), attempted first-degree home invasion, MCL 750.92, and domestic assault, MCL 750.81(2). He was sentenced to concurrent prison terms of 8 to 20 years for the home-invasion conviction, two to five years for the attempt conviction, and 93 days for the assault conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his request for a missing witness instruction, CJI2d 5.12. Jury instructions that involve questions of law are reviewed de novo on appeal, but the trial court's determination whether a particular instruction is applicable is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Shannon Nye, the victim of the domestic assault charge, did not appear for trial. After the prosecutor made a record regarding the efforts made to locate Nye, the trial court excused her production, MCL 767.40a(4); *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000), and denied the requested instruction. The missing witness instruction is not appropriate where the court excuses production of the witness after a finding of due diligence. *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000).

Defendant does not deny that the prosecutor made an effort to locate Nye. He contends that the efforts made were not sufficient because the prosecutor could have investigated other sources to attempt to learn Nye's whereabouts. However, due diligence requires that everything reasonable, not everything possible, be done. *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982), aff'd on rehearing 131 Mich App 669 (1984). The test is whether the prosecutor "made good-faith efforts to procure the testimony, not whether more stringent efforts would have produced it." *People v Connor*, 182 Mich App 674, 681; 452 NW2d 877 (1990).

Here, the trial court did not abuse its discretion in finding that due diligence had been shown and thus the missing witness instruction was not applicable.

Even if the trial court had erred in its determination regarding the missing witness instruction, defendant would not be entitled to relief. "Reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). In light of Tammy Hacker's testimony that she witnessed defendant break into her trailer, Jennifer Lasson's testimony that she witnessed defendant's attempt to break into her trailer, Hacker's and Lasson's testimony that they witnessed defendant physically assault Nye, and the testimonial and documentary evidence of a fresh wound to Nye's forehead, it is not more probable than not that the verdict would have been different had the court read the missing witness instruction. Accordingly, defendant has failed to establish a right to relief on this ground.

Defendant next argues that the prosecutor's conduct deprived him of a fair trial. Defendant did not preserve this issue because he did not object to the prosecutor's conduct at trial. Therefore, review is precluded unless defendant can establish a plain error that affected the outcome of the trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

In his closing argument, the prosecutor implied that Nye's failure to appear was not because the domestic assault charge was unfounded but because Nye, as a victim of domestic violence, was prone to protect her violent partner. Assuming without deciding that the remark was improper because it was unsupported by the evidence, *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001), defendant is not entitled to relief because he has not shown that it affected the outcome of the trial. As previously noted, both Hacker and Lasson testified to seeing defendant physically assault Nye and a police officer testified that Nye had a fresh wound to her forehead, which was documented in a photograph. Further, had defendant raised the issue at trial, any error could have been cured by a timely instruction. Absent an objection, the trial court's instruction that the arguments of the attorneys are not evidence was sufficient to dispel any prejudice. *People v Schutte*, 240 Mich App 713, 721-722; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio